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IN THE

# Supreme Court of the United States

**October Term, 1963**

**No. 739** [redacted]

IN THE MATTER OF THE APPLICATION OF
JOHN MIGUEL and RALPH BROWN,
*Petitioners,*

For an Order

*against*

THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, and FRANK S. HOGAN, DISTRICT ATTORNEY, NEW YORK COUNTY,
*Respondents.*

Pursuant to Article 78, Civil Practice Act

**On Petition for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department**

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# TABLE OF CONTENTS


| | PAGE |
|---|---|
| QUESTIONS PRESENTED | 1 |
| SUMMARY OF ARGUMENT | 2 |
| POINT I—The denial by the trial court of petitioners' pre-trial motions to suppress the evidence did not deprive petitioners of due process of law or the equal protection of the law | 3 |
| POINT II—A writ of certiorari should not be granted where the petitioners deliberately chose a state procedure which avoided a state appellate decision on the merits of their claim | 6 |
| CONCLUSION | 7 |


## TABLE OF AUTHORITIES

***Cases:***


| | |
|---|---|
| Adamson v. California, 332 U. S. 46 (1947) | 4 |
| Cleary v. Bolger, 371 U. S. 392 (1963) | 7 |
| Hogan v. Court of General Sessions, 296 N. Y. 1 (1946) | 6 |
| Jones v. United States, 362 U. S. 257 (1960) | 3, 5 |
| Maryland v. Baltimore Radio Show, 338 U. S. 910 (1950) | 6 |
| People v. Cangione, 33 Misc. 2d 23 (Queens Co. Ct. 1962) | 5 |
| People v. Mirasola, 35 Misc. 2d 886 (Gen. Sess. 1962) | 5 |

PAGE

Stefanelli v. Minard, 342 U. S. 117 (1951) 7

Twining v. New Jersey, 211 U. S. 78 (1908) 4

United States v. Gross, 137 F. Supp. 244 (S. D. N. Y. 1956) 5

United States v. Martin, 176 F. Supp. 409 (S. D. N. Y. 1959) 5

United States v. Priminzini, 6 F. R. D. 207 (S. D. N. Y. 1946) 5

United States v. Viale, 312 F. 2d 595 (2d Cir. 1963) 4

United States v. Vomero, 6 F. R. D. 275 (E. D. N. Y. 1946) 5

***Statutes and Constitutions:***

N. Y. Code Criminal Procedure:

Sec. 813-c 2, 3, 6

N. Y. Civil Practice Laws and Rules—Art. 78:

7801 et seq. 6

United States Constitution:

Fifth Amendment 2, 3

Fourteenth Amendment 3, 4

Federal Rules of Criminal Procedure:

Rule 41-e 3

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**On Petition for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department**

## Questions Presented

1. Did the denial by the trial court of petitioners' pre-trial motions to suppress evidence and for a preliminary hearing in regard thereto, on the ground that petitioners failed to raise any issue of fact in their moving papers

deprive petitioners of due process of law and the equal protection of the law in that it required petitioners to incriminate themselves?

2. Should a writ of certiorari be granted where petitioners deliberately avoided a state appellate decision on the merits of their claim?

## Summary of Argument

The writ should be disallowed for the following reasons:

1. The authorized mode of review of denials of motion to suppress is by an appeal from conviction [N. Y. Code Crim. Pro. §813-c]. Instead of proceeding to judgment and appealing, petitioners sought to prohibit further prosecution. But a writ of prohibition under New York Law, is not intended as a substitute for appellate review. There is, therefore, no New York appellate ruling on the validity of petitioners' claims. Under such circumstances, discretion should be exercised by this Court so as to deny the petition.

2. The privilege against compulsory self-incrimination embodied in the Fifth Amendment to the United States Constitution does not extend to the States.

3. Merely requiring movants to allege facts in support of their motion to suppress does not impose any unconstitutional burden on defendants. A court in deciding a motion to suppress must know the facts which movants rely upon in support of the relief sought. In the absence of any factual allegations a court is entitled to deny the mo-

tion without a hearing, and without prejudice to renew upon proper motion papers. In so ruling, the trial court followed established federal practice which, in turn, is reflective of normal adversary procedures.

## POINT I

**The denial by the trial court of petitioners' pre-trial motions to suppress the evidence did not deprive petitioners of due process of law or the equal protection of the law.**

The petitioners moved before trial for an order suppressing certain evidence, and for a preliminary hearing to show that the evidence was illegally obtained. The motions were denied, without prejudice to renewal upon proper motion papers, on the ground that neither petitioner had submitted papers raising any issue of fact. Only an affidavit by counsel was submitted, and this related no facts whatsoever.

The essential contention of the petitioners is that the ruling of the trial court would have required them to incriminate themselves, thereby depriving them of the Fifth Amendment protection against self-incrimination as incorporated in the due process and equal protection clauses of the Fourteenth Amendment.

The motions were made pursuant to Section 813-c of the New York Code of Criminal Procedure, which is similar to Rule 41e of the Federal Rules of Criminal Procedure. Both statutes provide that a person aggrieved or claiming to be aggrieved by an unlawful search and seizure may

move the court for the return of the property or for its suppression in evidence. The court is to hear evidence upon any issue of fact necessary for the determination of the motion. The decision of the trial court was based upon the absence of any issue of fact raised by the petitioners' moving papers.

At the outset, it should be noted that this Court has yet to hold that the federal protection against compulsory self-incrimination is applicable to the States through the operation of the Fourteenth Amendment. On the contrary, the Court has specifically denied that the privilege against self-incrimination is included in the concept of due process of law [*Adamson* v. *California*, 332 U. S. 46 (1947); *Twining* v. *New Jersey*, 211 U. S. 78 (1908)]. Thus, the petition fails to assert any basis for relief heretofore recognized by this Court.

But in any event it is clear that the requirement of raising a factual issue as a condition precedent to the holding of a hearing on a motion to suppress evidence allegedly seized illegally, imposes no burden inconsistent with normal adversary procedures. Granted that the petitioners had "standing" to make the motion in the first instance [see *Jones* v. *United States*, 362 U. S. 257 (1960)], it does not follow that the court must conduct a hearing or grant the motions where the defendants are unwilling to support their motion with evidence [*United States* v. *Viale*, 312 F. 2d 595 (2d Cir. 1963)]. Apprising the court of what this evidence is and thereby enabling the court to determine the merits of the motion, requires that "some evidence of probative value in affidavit form should be pre-

sented before a court is required to entertain the motion" [*United States* v. *Vomero*, 6 F. R. D. 275, 276 (E. D. N. Y. 1946)]. Indeed, the submission of affidavits might well obviate the need for a hearing [*United States* v. *Privinzini*, 6 F. R. D. 207 (S. D. N. Y. 1946)], for where the facts are not in dispute there is no requirement that a hearing be had [*United States* v. *Gross*, 137 F. Supp. 244 (S. D. N. Y. 1956)]. Such proceeding is authorized only where the opposing affidavits pose contested issues of fact [*United States* v. *Martin*, 176 F. Supp. 409 (S. D. N. Y. 1959); *People* v. *Cangione*, 33 Misc. 2d 23 (Queens Co. Ct. 1962); *People* v. *Mirasola*, 35 Misc. 2d 886 (Gen. Sess. 1962)].

It should also be stressed that the petitioners' motions for suppression and for a preliminary hearing in regard thereto, were not denied because petitioners failed to allege ownership or possession of the evidence in question [see *Jones* v. *United States*, *supra*], but solely because they neglected or refused to allege any facts whatsoever in support of the motion. This minimal requirement can hardly be said to contravene established constitutional principles.

## POINT II

**A writ of certiorari should not be granted where the petitioners deliberately chose a state procedure which avoided a state appellate decision on the merits of their claim.**

An additional ground for disallowance of the writ is the failure of petitioners to exhaust or indeed even seek to utilize the state remedies available for the adjudication of the merits of their claim [*Maryland* v. *Baltimore Radio Show*, 338 U. S. 912 (1950)]. An order denying a motion to suppress is appealable from a judgment of conviction [N. Y. Code Crim. Pro. 813-c]. Rather than plead guilty and appeal, or proceed to trial and appeal if convicted, petitioners sought a writ of prohibition pursuant to Article 78 of the New York Civil Practice Law and Rules, 7801 *et seq.*, restraining the Supreme Court of the State of New York and the District Attorney of New York County from proceeding with the prosecution. It is, in fact, the denial of the writ from which petitioners now seek relief in this Court. But a writ of prohibition in New York is "not available ordinarily as a method of premature review" [*Hogan* v. *Court of General Sessions*, 296 N. Y. 1, 9 (1946)]; and a denial of the writ is hence not a decision on the merits of the underlying claim.

Petitioners therefore deliberately sought a remedy not intended to reach the merits of their contentions. They cannot now claim that the law governing the granting of writs of prohibition unconstitutionally deprived them of a decision on the merits when they themselves intentionally

chose to avoid such an appellate decision. New York can hardly be faulted for petitioners' choice of an inapposite remedy when the statute which entitled them to move to suppress the evidence also informed them of the proper mode of review.

Petitioners, in effect, are seeking federal intervention at the highest possible level, bypassing entirely the state appellate courts. Granting review at this stage "would expose every State criminal prosecution to insupportable disruption" [*Stefanelli* v. *Minard*, 342 U. S. 117, 123 (1951); *Cleary* v. *Bolger*, 371 U. S. 392, 397 (1963)].

## Conclusion

***The petition for a writ of certiorari should be denied.***

Respectfully submitted,

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February, 1964